Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Review of the	)	WC Docket No. 02-313
Telecommunications Regulations	)	
Within the Purview of the	)	
Wireline Competition Bureau	)	
	)	

REPLY COMMENTS OF THE
COMPETITIVE UNIVERSAL SERVICE COALITION

The Competitive Universal Service Coalition ("CUSC"), by counsel, hereby files its reply comments in opposition to the comments of the National Telecommunications Cooperative Association ("NTCA"), filed October 18, 2002 in the above-captioned proceeding. 1/

This Commission has already rejected the anti-competitive, anti-consumer proposal to add "equal access" (*i.e.*, the ability to presubscribe to any long distance carrier) to the services included in the definition of "universal service" that all eligible telecommunications carriers ("ETCs") must offer. 2/ It should reject NTCA's proposal once again here, for three reasons: (1) the proposal is procedurally

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1/ *See The Commission Seeks Public Comment in 2002 Biennial Review of Telecommunications Regulations Within the Purview of the Wireline Competition Bureau*, WC Docket No. 02-313, Public Notice, FCC 02-267 (rel. Sept. 26, 2002). Because the issues discussed here closely relate to other proceedings, we are filing copies of these reply comments in WC Docket No. 02-39 (Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers) and CC Docket No. 96-45 (Federal-State Joint Board on Universal Service).

2/ NTCA Comments at 5-6; *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8819-20, ¶¶ 78-79 (1997) ("*Universal Service First Report and Order*"), *subsequent history omitted.*

improper here, and was specifically considered and rejected in the appropriate context; (2) the Communications Act precludes applying equal access requirements to commercial mobile radio service ("CMRS") providers; and (3) imposing equal access on CMRS carriers would harm consumers and disserve the public interest. Rather than imposing an unnecessary and anti-competitive requirement on non-dominant CMRS providers, the Commission should consider *eliminating* equal access requirements for incumbent local exchange carriers ("ILECs") in areas where they face competition.

First, NTCA's proposal is procedurally improper in this docket in that Section 11 of the Act, the biennial review provision with which this proceeding is concerned, relates only to repealing regulations that are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 3/ Section 11 is about *eliminating* regulations that are unnecessary due to competition. It provides no basis for *imposing new* regulations that are unnecessary due to competition, as NTCA proposes.

The NTCA proposal is also improper here because the identical issue has been examined extensively in the universal service proceeding, CC Docket No. 96-45. In 1996-97, the Commission considered – and definitively decided against –making equal access part of the definition of universal service. 4/ Subsequently, in late 2000, it referred the definition of universal service to the

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3/ *See* 47 U.S.C. § 161(a)(2).

4/ *Universal Service First Report and Order,* 12 FCC Rcd at 8819, ¶ 78.

Federal-State Joint Board again, 5/ whereupon the Joint Board conducted an exhaustive consideration of the equal access issue and failed to recommend adoption of the very same requirement NTCA proposes again here (or any other change to the definition of universal service, for that matter). 6/

Second, the Act itself prohibits imposing equal access on CMRS carriers that seek ETC designation. As the members of the Joint Board opposed to the addition of equal access noted:

> Section 332(c)(8) states that CMRS providers "shall not be required to provide equal access." This section does permit the Commission to require unblocked access through the use of carrier identification codes or other mechanisms, if it determines that consumers are being denied access to their telephone toll service provider of choice, and such denial is contrary to the public interest. However, the statute provides no other exception to its general prohibition of any requirement to provide equal access. 7/

Moreover, equal access does not meet the criteria in Section 254(c)(1), the Act's provision allowing the definition of universal service to evolve over time, in that equal access is not a "service," but rather a legal mandate imposed by the courts and the FCC on ILECs, due to historic ILEC monopoly control of the local exchange and their anti-competitive attempts to extend such control into long distance. 8/

5/ *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 25257 (2000).

6/ *Federal-State Joint Board on Universal Service*, Recommended Decision, 17 FCC Rcd 14095 (July 10, 2002) ("*Joint Board Recommendation on Definition of Universal Service*").

7/ *Id*. at 14122, ¶ 70 (citation omitted).

8/ *U.S. v. AT&T*, 552 F.Supp. 131, 195-197 (D.D.C. 1982); *U.S. v. GTE*, 603 F.Supp 730, 743-46 (D.D.C. 1984); *MTS and WATS Market Structure*, CC Docket

While requiring equal access would exclude CMRS providers from qualifying as ETCs as noted above, 9/ *not* requiring equal access is competitively neutral. Such an approach entrusts to *consumers* the decision whether to take local service from an ETC that offers equal access or from an ETC that offers packaged local/long-distance service. It makes no sense to try to serve the original goal underlying equal access – promoting long distance competition in a local monopoly environment – by depriving consumers of local service options, which would be the result of making equal access part of the definition of universal service.

Third, imposing an equal access requirement on CMRS carriers would harm consumers and disserve the public interest. As noted by the Joint Board members who opposed adding equal access to the definition of universal service, mandating provision of equal access by all ETCs would likely reduce competition in rural and high cost areas by deterring CMRS carriers from seeking ETC designation to provide service in competition with ILECs, even though CMRS carriers are the most likely source of facilities-based competition in some rural and high-cost areas. 10/ These Joint Board members also found that the choice of

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No. 78-72, Phase III, Report and Order, 100 FCC 2d 860 (1985); *see also* 47 U.S.C. § 251(g); *cf.*, NCTA at 3 (noting there are "a few areas where interexchange carriers have not requested balloting").

9/ *See supra* at 1-2 (citing *Universal Service First Report and Order*, 12 FCC Rcd at 8819-20, ¶¶ 78-79).

10/ *Joint Board Recommendation on Definition of Universal Service*, 17 FCC Rcd at 14123, ¶ 71. It was also noted that some ILECs serving remote rural areas do not currently provide equal access, so if equal access were added to the definition of supported services, such ILECs also would be ineligible for federal support, which could jeopardize the provision of service in those areas. *Id.*

whether to obtain local service from carriers offering equal access should be made by consumers, not government mandate, especially given that CMRS providers offer benefits to consumers (like buckets of minutes for use in local or long distance calling) that outweigh the lack of 1+ dialing to a presubscribed IXC. 11/

In addition, the mere fact that some ILECs are required to provide equal access is no reason to impose an equal access requirement on non-dominant competitors. 12/ The Commission adopted equal access rules as a remedy to ILEC bottleneck control over local exchange service and the ability to leverage that control in the market for long distance. 13/ Non-dominant carriers such as CMRS providers, however, lack any such market power, thereby making equal access requirements for them inappropriate. Indeed, with respect to service provided by such carriers, consumers benefit from the integration of formerly separate long distance and local offerings. As Commissioner Abernathy noted:

> [A]llowing wireless carriers to offer consumers innovative service packages including bundles of any-distance minutes promotes, rather than harms, consumer welfare. There can be little question that both the interexchange and mobile wireless markets are highly competitive, and that wireless carriers'

11/ *Id*.

12/ *See id*., ¶ 72. It should be noted that even the nation's largest long distance providers, who arguably might benefit most from having equal access added to the definition of universal service, did not in their comments to the Joint Board advocate the addition of equal access. *See generally* Comments of AT&T Corp.; WorldCom, Inc.; Sprint Corporation; Qwest Communications International Inc., in *Federal-State Joint Board on Universal Service Seeks Comment on Review of the Definition of Universal Service*, 66 FR 46461 (Aug. 21, 2001).

13/ *See generally MTS and WATS Market Structure*, *supra* note 8.

> innovative offerings have led to extensive intermodal competition. 14/

All told, there is no basis for extending the equal access requirement in the manner proposed by NTCA in this proceeding.

In fact, rather than imposing unnecessary regulation on non-dominant competitive entrants, the Commission should seriously consider eliminating equal access requirements on ILECs in appropriate circumstances where such "regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." 15/ Such elimination is facilitated by the provision of the 1996 Act that continues the effectiveness of the previously adopted equal access requirements, Section 251(g), wherein Congress expressly contemplated that the Commission "supersede" the equal access requirements when they are no longer necessary. 16/

CUSC proposes that the Commission eliminate ILEC equal access requirements when there is sufficient local competition that those requirements are no longer necessary. In the case of rural ILECs, equal access requirements could be eliminated three years after the date that a designated competitive ETC in its service area has begun to receive high-cost universal service support. Such a three-year sunset is analogous to that Congress adopted in Section 272 for Bell operating

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14/ *Joint Board Recommendation on Definition of Universal Service*, 17 FCC Rcd at 14133-14 (Separate Statement of Commissioner Kathleen Q. Abernathy).

15/ 47 U.S.C. § 161(a)(2).

16/ *See* 47 U.S.C. § 251(g). *See also* 47 U.S.C. § 160 (authorizing Commission to forbear from applying requirements of Act or rules under specified circumstances).

companies with respect to the structural separation requirements for their long distance affiliates. 17/ CUSC believes it would make sense to extend a similar concept to rural ILECs.

In this regard, CUSC concurs with the comments of the United States Telecom Association in the instant proceeding:

> [M]arket forces are likely to yield better economic results than regulation. Eliminating unnecessary regulation reduces regulatory costs, freeing up capital for investment in valuable infrastructure and permitting carriers to serve customers more cost effectively. 18/

The same rationale compels the Commission to reject NTCA's proposal to apply equal access requirements to CMRS carriers; a more rational approach would be to eliminate such requirements for rural ILECs at the appropriate point in time.

17/ 47 U.S.C. § 272(f). Specifically, Congress made the judgment that three years after the inception of local competition, the separate long distance requirement should no longer apply.

18/ USTA Comments at 2.

In conclusion, the Commission should reject NTCA's anti-competitive effort to saddle new competitive entrants with unnecessary legacy regulations such as equal access, which were designed to remedy ILEC market power. Instead, the Commission should *eliminate* the equal access requirement at an appropriate time after competitive entrants have emerged to challenge the ILECs.

Respectfully submitted

COMPETITIVE UNIVERSAL SERVICE COALITION

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November 4, 2002